(3)

Supreme Court, U.S.
FILED
AUG 12 2005
OFFICE OF THE CLERK

No. 04-1264

IN THE

Supreme Court of the United States

BUCKEYE CHECK CASHING, INC.,

Petitioner,

v.

JOHN A. CARDEGNA and DONNA REUTER,

Respondents.

On Writ of Certiorari to the Supreme Court of Florida

BRIEF OF *AMICUS CURIAE* COMMUNITY FINANCIAL SERVICES ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONER

JAMES T. MCINTYRE
Counsel of Record
MCINTYRE LAW FIRM, PLLC
1155 15th Street, N.W.
Suite 1101
Washington, D.C. 20005
(202) 659-3900

Of Counsel:
JAMES C. SIVON
BARNETT SIVON & NATTER, P.C.
1155 15th Street, N.W.
Suite 1101
Washington, D.C. 20005
(202) 463-6040

TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities ii

Interest of *Amicus Curiae* 1

Statement of the Case 2

Summary of the Argument 2

Argument 3

I. The Payday Advance Industry Serves a Significant Market for Short-Term Credit 3

II. The Payday Advance Industry is Comprehensively Regulated 6

III. Arbitration Clauses Are An Important Part Of Payday Advance Agreements 9

Conclusion 11

TABLE OF AUTHORITIES

Page(s)

CASES:

McKenzie Check Advance v. Betts, 2005 Fla. LEXIS 1353 . . 8

STATUTES:

15 U.S.C. §§ 41 *et seq.* 8

15 U.S.C. § 45. 9

15 U.S.C. §§ 1601 *et seq.* 8

15 U.S.C. § 6601(a)(5). 10

Az. Rev. Stat. § 6-1251 7

Fla. Stat. ch. 560, Part IV 7

Fla. Stat. § 560.303(1) 7

Ind. Code Ann. § 24-4.5-7-101 7

815 Ill. Comp. Stat. 122 7

Ohio Rev. Code Ann. § 1315.39 7

RULES:

Florida Administrative Rule 3C-560.803 8

REPORTS:

H.R. Rep. No. 97-542 (1982) 9

S. Rep. No. 68-536 (1924) 9

Table of Authorities continued

Page(s)

OTHER SOURCES:

Cypress Research Group, "Payday Advance Customer Satisfaction Survey," May 2004 . . . . . 5, 6

Ernst & Young, "Outcomes of Arbitration: An Empirical Study of Consumer Lending," February 2005, http://www.arb-forum.com/EY_2005.pdf 10

Elliehausen and Lawrence, "Payday Advance Credit: An Analysis of Consumer Demand," Monograph #35, Georgetown University, April 2001, http://www.msb.edu/prog/crc/order/Mono35.pdf . . . 4, 5

INTEREST OF *AMICUS CURIAE*

Amicus curiae Community Financial Services Association of America ("CFSA") is the national trade association for the payday advance industry, representing the owners of more than one-half of the estimated 22,000 payday advance retail outlets in the United States. *Amicus curiae* has authored this brief in whole, and has no stake in any of the parties to this litigation.[1] *Amicus curiae* has no interest in the outcome of this case, other than in seeking, on behalf of its members, the correct and consistent application of federal law to claims such as those asserted in this action.

Amicus curiae has established – and enforces among its members – responsible industry practices and appropriate consumer rights and protections ("Best Practices"). The Best Practices of *amicus curiae* (attached as Exhibit A) require its members to comply with all applicable laws and regulations; to disclose fully the terms and cost of each transaction; to limit renewals of payday advances; to encourage consumers to use the service responsibly by informing consumers of the intended use of the product and by notifying them of credit counseling alternatives; to provide consumers with a next-day right of rescission; and to refrain from the threat or pursuit of criminal action for collection purposes.

Many payday advance providers, including Petitioner Buckeye Check Cashing, Inc. and other *amicus curiae* members, include arbitration clauses in their transaction agreements. Throughout the payday advance industry, arbitration clauses are important provisions to help speedily

---

[1] Petitioner, Buckeye Check Cashing, Inc., is a member of *amicus curiae*. This brief represents the perspective of *amicus curiae* and not of any party. Petitioner has not borne any portion of the cost of preparation of this brief, other than through its payments of ordinary membership dues to *amicus curiae*. The parties have consented to the filing of this brief, and letters evidencing such consent have been filed with the Clerk of this Court, pursuant to S. Ct. R. 37.2.

resolve disputes in an inexpensive way. *Amicus curiae* believes that the interests of the payday advance industry and of the consuming public are best protected by the holdings of six federal courts of appeals, which have stated that the Federal Arbitration Act does not allow a party to avoid arbitration by claiming that the underlying contract containing an arbitration clause (but not the arbitration clause itself) is void for illegality. The outcome of this matter will have a long-lasting and economically powerful impact on members of *amicus curiae* as well as far-reaching implications for financial institutions, which consistently use arbitration provisions in their credit-related agreements.

Accordingly, *amicus curiae* desires to share its perspective on these issues to assist the Court in its disposition of this case.

STATEMENT OF THE CASE

Amicus curiae concurs in Petitioner's Statement of the Case.

SUMMARY OF THE ARGUMENT

The payday advance industry has become a major financial resource for millions of consumers. It is estimated that there are over 22,000 individual payday advance outlets in the United States, and that the industry provided over $40 billion in payday advances in 2003. This industry serves a void created by the withdrawal of traditional lenders from the small loan market, and its growth is a direct result of consumer demand. Payday advances compare favorably with, and are often less expensive than, other alternatives, for example, overdraft protection products and late fees. The payday advance industry is and has been heavily regulated, both at the state and federal levels. Payday advance providers are subject to state loan and/or check cashing laws, the disclosures mandated by the federal Truth-in-Lending Act, and the prohibitions on unfair

and deceptive trade practices contained in the Federal Trade Commission Act. Arbitration is important and useful in the payday advance industry, and such clauses have long been features of payday advance agreements. These clauses allow payday advance firms to resolve disputes in a low cost, quick and efficient manner. If unable to rely upon arbitration clauses in payday advance agreements, providers would be denied these beneficial procedures.

ARGUMENT

I. THE PAYDAY ADVANCE INDUSTRY SERVES A SIGNIFICANT MARKET FOR SHORT-TERM CREDIT

Respondents in this case have argued that the Court should affirm the Florida Supreme Court's judgment essentially as a way to penalize the payday advance industry. Respondents state that if the Court rules in Petitioner's favor regarding arbitration clauses in payday advance agreements, the Court "would be required to find that legally cognizable contracts existed (if they contained arbitration clauses) even if they provided for murder-for-hire, the sale of child pornography or the sale of illegal drugs[,]"[2] suggesting that, at least in the context of the legal issue involved here, payday advance agreements are indistinguishable from those types of contracts. That argument, needless to say, is both legally and factually misplaced.

The payday advance industry serves a void created by the withdrawal of traditional lenders from the small loan market and has grown rapidly to become a large part of the financial services industry. It is estimated that the number of payday advance firms rose from 10,000 in 2000 to 22,000 in 2004, and it is predicted that such rapid expansion of the industry will

---

[2] Opp. To Cert. Pet. 3.

continue for at least three to five more years. In 2003, the industry provided over $40 billion in payday advances.

The typical payday advance involves a small, unsecured, short-term cash advance until the next payday for an employed worker who maintains a checking account. It is a very simple transaction with the finance charge expressed clearly as both a dollar amount and as an annual percentage rate ("APR"). To obtain such an advance, the consumer applies with very basic credit information and enters into an agreement that fully complies with applicable federal and state disclosure requirements, including disclosure of the APR. The consumer writes a personal check for the advance amount plus a finance charge and immediately receives the transaction proceeds by cash, electronic funds transfer or check. The payday advance provider holds the personal check until the borrower's payday, usually in about two weeks. Payday advances are short-term transactions and most generally are used to navigate unanticipated cash-flow problems, such as repair of an automobile needed to get to and from work; medical expenses; or an unexpected home-repair bill.

In addition to traditional lenders abandoning the small, short-term loan market, the consolidation of the banking industry has further deprived consumers of access to traditional sources of small loans. The closing of redundant bank branches has resulted in the absence of brick-and-mortar financial services storefronts in many areas of the country. Because payday advance borrowers generally have limited small-denomination sources of credit available to them, a payday advance satisfies their credit needs.

The Credit Research Center at Georgetown University's McDonough School of Business authored the first comprehensive analysis of consumer demand for, and use of,

payday advance services.[3] The study shows that payday advances satisfy an unfulfilled demand for small denomination, short-term credit. Important findings of the study include:

- 92% of borrowers view payday advances as beneficial.
- About 66% of most recent new advances were used to cover an unexpected expense or a temporary reduction in income.
- Nearly two-thirds of customers who considered other sources of credit chose a payday advance because of the quick and easy process, the fast approval and the limited paperwork; a mere 6% said that they had no other credit option.

More recently, in 2004, the Cypress Research Group conducted a study that analyzes consumer satisfaction with payday advances.[4] 2,000 payday advance customers who had obtained a payday advance within the past three months were asked about several aspects of their satisfaction with their recent payday advance. Customers surveyed stated the following:

- In comparison to other financial products with which they had recent experiences, the payday advance was among the most highly rated (75% satisfied), second only to check overdraft protection.

---

[3] Elliehausen and Lawrence, "Payday Advance Credit: An Analysis of Consumer Demand," Monograph #35, Georgetown University, April 2001, http://www.msb.edu/prog/crc/order/Mono35.pdf.

[4] Cypress Research Group on behalf of CFSA. "Payday Advance Customer Satisfaction Survey," May 2004.

- They were highly satisfied with general aspects of the payday advance experience, such as the level of service during the application process (88% satisfied), the level of service while the payday advance was outstanding (85%), and the payday advance itself (82%).
- Regarding other aspects of the payday advance, 85% were satisfied with the ability to renew the payday advance, 82% were satisfied with the maximum payday advance amount allowed, and 77% were satisfied with the payday advance repayment schedule.

The results of this survey indicate strong consumer satisfaction with the payday advance industry.[5]

II. THE PAYDAY ADVANCE INDUSTRY IS COMPREHENSIVELY REGULATED

Payday advance firms are subject to both state and federal regulation. As a general rule, they may operate only in those states in which they may be licensed. Currently, 37 states and the District of Columbia have adopted such licensing statutes. The principal exception to this general rule is that some payday advance firms act as agents for commercial banks in a few states that do not otherwise license payday advance providers. In those instances, however, the payday advance firm only provides marketing and administrative services to the commercial bank, which enters into the loan agreement with the borrower and funds the loan. The activities of the banks and their agents are heavily regulated and regularly examined by the appropriate federal and state banking agencies, *e.g.* the state banking regulator and the Federal Deposit Insurance

---

[5] *See id.* pp. 4-5.

Corporation for state-chartered banks that are not members of the Federal Reserve system.

State licensing statutes[6] typically impose a number of conditions on payday advance firms: limits on the overall advance amount, the term of the advance, the maximum fees that can be charged and the number of renewals. Some states also mandate "cooling off" periods between transactions, and others prohibit payday advance providers from conducting a transaction with a customer who has an outstanding payday advance from another firm.

Florida, for example, is a state that currently has laws in place that permit and regulate deferred presentment transactions (as payday advances are referred to in Florida).[7] In 1994, the Florida Legislature adopted the state's "Money Transmitters Code" (the "Code"), which requires businesses that provide currency in exchange for a check to register as a "check casher."[8] Shortly thereafter, the deferred presentment industry sought an opinion from the agency charged with applying and interpreting the Code, the Florida Department of Banking and Finance (the "Department"), regarding whether deferred presentment transactions were authorized under that law. In response, the Department issued an opinion in February 1995, in which it concluded that deferred presentment transactions were permissible under the Code as long as they were conducted in accordance with the requirements applicable to all other check-cashing transactions. That opinion was

---

[6] *See e.g.* Az. Rev. Stat. § 6-1251; 815 Ill. Comp. Stat. 122 (effective Dec. 6, 2005); Ind. Code Ann. § 24-4.5-7-101; Ohio Rev. Code Ann. § 1315.39.

[7] Deferred Presentment Act, Fla. Stat. ch. 560 Part IV (2001).

[8] § 560.303(1), Fla. Stat. (Supp. 1994).

subsequently affirmed in regulations issued by the Department in 1997 that clearly provided for deferred presentment check-cashing.[9] In addition, the Code's authorization of deferred presentment check-cashing was confirmed again by a 1998 Department advisory letter as well as by an opinion of the Florida Attorney General in 2000. In 2001, the "Deferred Presentment Act," which specifically regulates deferred presentment transactions separately from other check-cashing transactions, became effective.[10] Like most state laws regulating the payday advance industry, the law requires licensing; limits overall amounts that can be advanced; establishes maximum fees that may be charged and prohibits making an advance to a customer who has an outstanding payday advance from another firm.

At the federal level, the Truth-in-Lending Act[11] and the Federal Trade Commission Act[12] are the principal laws relevant to payday advances. The Truth-in-Lending Act requires that payday advance firms disclose the cost of a payday advance in dollar amount and annual percentage terms. When the Federal Reserve Board, which implements the Truth-in-Lending Act, proposed a regulation subjecting payday advances to this disclosure requirement, *amicus curiae* filed a comment in support of the regulation. Section 5 of the Federal Trade Commission Act prohibits companies such as payday advance firms from engaging in unfair and deceptive marketing

---

9 Florida Administrative Rule 3C-560.803 (Repealed 11-4-01).

10 Whether the Department exceeded the scope of its authority in interpreting the Code is currently the subject of litigation in the Florida Supreme Court. *McKenzie Check Advance v. Betts*, 2005 Fla. LEXIS 1353.

11 15 U.S.C. §§ 1601 *et seq.*

12 15 U.S.C. §§ 41 *et seq.*

practices, and empowers the Federal Trade Commission to take civil actions against any company that engages in such practices.[13]

III. ARBITRATION CLAUSES ARE AN IMPORTANT PART OF PAYDAY ADVANCE AGREEMENTS

Since the mid-1990s, the inclusion of arbitration clauses in consumer agreements has increased immensely. Congress, when it enacted the Federal Arbitration Act in 1925, and many states, through adoption of the Uniform Arbitration Act, have recognized the importance of allowing parties to agree to binding arbitration and limiting the right to appeal an arbitrator's decision in contract disputes. In the payday advance industry, arbitration clauses in consumer agreements have become standard. Given the small amount of a payday advance, arbitration is particularly well-suited to resolve disputes.

Congress has set forth the case for arbitration a number of times over the years. The Senate Judiciary Committee, when recommending passage of the Federal Arbitration Act in 1924, stated that arbitration allows parties to "avoid the delay and expense of litigation," and so appealed to "business . . . as well as to individuals."[14] In 1982, a House Committee determined that "[t]he advantages of arbitration are many; it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive . . . [and] it is often more flexible in regard to scheduling of times and places of hearings."[15] More recently, Congress stated in the Y2K Act that arbitration

---

13 15 U.S.C. § 45.

14 S. Rep. No. 68-536, at 3 (1924).

15 H.R. Rep. No. 97-542 (1982).

is useful because "individuals already find [the legal] system inaccessible because of its complexity and expense."[16]

In February 2005, the National Arbitration Forum, one of the country's three leading alternative dispute resolution organizations, announced that a study conducted by Ernst & Young, entitled *Outcomes of Arbitration: An Empirical Study of Consumer Lending*,[17] confirmed that consumers find the arbitration process to be advantageous and beneficial in resolving disputes. Results of the study revealed that consumers prevail in arbitrations conducted by the National Arbitration Forum at the same rate they prevail in state court – 55%. Furthermore, as a part of the study, a survey taken of a small random sample of claimants in consumer arbitration reinforced consumer satisfaction with respect to resolution, process, cost, and timeliness of arbitration. Consequently, it is in the interest of both lenders and consumers to resolve disputes in arbitration rather than in traditional lawsuits.

The importance and usefulness of arbitration in the payday advance industry is substantial. The outcome of this case will have enormous implications not only for arbitration clauses in consumer agreements, but also contract disputes in general.

---

[16] 15 U.S.C. § 6601(a)(5).

[17] http://www.arb-forum.com/EY_2005.pdf.

CONCLUSION

For the reasons set forth above, *amicus curiae* strongly supports Petitioner and urges the Court to reverse the judgment of the Florida Supreme Court.

Respectfully submitted,

James T. McIntyre
Counsel of Record
McIntyre Law Firm, PLLC
1155 15th Street, N.W.
Suite 1101
Washington, D.C. 20005
(202) 659-3900

Of Counsel:
James C. Sivon
Barnett Sivon & Natter, P.C.
1155 15th Street, N.W.
Suite 1101
Washington, D.C. 20005
(202) 463-6040

EXHIBIT A

Best Practices for the Industry

To be a member in good standing of CFSA, a payday advance provider must abide by the following best practices:

1. **Full disclosure.** A member will comply with the disclosure requirements of the State in which the payday advance office is located and with Federal disclosure requirements including the Federal Truth in Lending Act. A contract between a member and the customer must fully outline the terms of the payday advance transaction. Members agree to disclose the cost of the service fee both as a dollar amount and as an annual percentage rate ("APR").
2. **Compliance.** A member will comply with all applicable laws. A member will not charge a fee or rate for a payday advance that is not authorized by State or Federal law.
3. **Truthful advertising.** A member will not advertise the payday advance service in any false, misleading, or deceptive manner.
4. **Encourage consumer responsibility.** A member will implement procedures to inform consumers of the intended use of the payday advance service. These procedures will include notifying consumers that a payday advance is a short-term cash flow tool not designed as a solution for longer term financial problems and informing customers of the availability of credit counseling services.
5. **Rollovers.** A member will comply with State laws on rollovers (the extension of an outstanding advance by payment of only a fee). In States where rollovers are

not specifically allowed a member will not under any circumstances allow a customer to do a rollover. In the few States where rollovers are permitted, a member will limit rollovers to four (4) or the State limit, whichever is less.

6. **Right to rescind.** A member will give its customers the right to rescind, at no cost, a payday advance transaction on or before the close of the following business day.

7. **Appropriate collection practices.** A member must collect past due accounts in a professional, fair and lawful manner. A member will not use unlawful threats, intimidation, or harassment to collect accounts. CFSA believes that the collection limitations contained in the Fair Debt Collection Practices Act (FDCPA) should guide a member's practice in this area.

8. **No criminal action.** A member will not threaten or pursue criminal action against a customer as a result of the customer's check being returned unpaid or the customer's account not being paid.

9. **Enforcement.** A member will participate in selfpolicing of the industry. A member will be expected to report violations of these Best Practices to CFSA, which will investigate the matter and take appropriate action. Each member company agrees to maintain and post its own toll-free consumer hotline number in each of its outlets.

10. **Support balanced legislation.** A member will work with State legislators and regulators to support responsible legislation of the payday advance industry that incorporates these Best Practices.

11. **Relationships with financial institutions.** A member may market and service payday advances made by a federally insured financial institution, provided the financial institution does the following: (1) sets its own credit criteria; (2) approves and funds each advance; (3) complies with applicable State disclosure requirements, where not inconsistent with Federal law; (4) complies with applicable State law as to the number of rollovers; (5) permits the member to purchase no more than a de minimis amount of the advances, or any such other amount which may be consistent with safety and soundness determinations by Federal or State banking regulators; (6) complies with the guidelines and regulations on payday lending issued by the financial institution's Federal or State regulator; and (7) complies with these Best Practices unless the Best Practices conflict with this Paragraph, in which case the terms of this Paragraph shall apply.

12. **Military.** A member will comply with a separate code of Military Best Practices that addresses the unique circumstances of active duty military customers. These special consumer protections include, among others: a prohibition on the garnishment of military wages or salaries and on contacting the military chain of command to collect payment; and the establishment of financial literacy initiatives that will benefit service men and women.

2005